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No. 04-1739

IN THE

Supreme Court of the United States

JEFFREY BEARD,

Petitioner,

v.

RONALD BANKS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Whether the Pennsylvania Department of Corrections' policy of denying secular newspapers, magazines, and personal photographs to the most difficult inmates in its system in an effort to promote security and good behavior violates the First Amendment under the standard of *Turner v. Safley*.

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STATEMENT OF THE CASE

The genesis of this Section 1983 class action was the Pennsylvania Department of Corrections' seizure of a *Christian Science Monitor* newspaper mailed to inmate Ronald Banks pursuant to a subscription Mr. Banks had with the publisher. [JA 14, ¶ 11; JA 21, ¶ 11; JA 178-179; JA 50] Banks was confined at that time in the Department's Long Term Segregation Unit, a maximum security cellblock located on the grounds of the State Correctional Institution at Pittsburgh. [JA 12, ¶¶ 2; JA 21] The confiscation occurred within the framework of an administrative policy which prohibits inmates housed on Level 2 status in the Unit (as Banks was) from receiving newspapers or magazines that are not religious or legal in nature. [JA 12, ¶¶ 2; JA 21; JA 90-91]

Banks filed a civil rights complaint in the United States District Court in Pittsburgh to challenge the constitutionality of the policy after prison personnel refused to deliver his *Christian Science Monitor*. [JA 11-19] The pleading alleged that the regulation violates free speech by unreasonably denying him and other Level 2 prisoners access to periodicals addressing governmental affairs, international news, and other current event topics which pose no threat to institutional security or to any other legitimate penological interest. [See JA 14, ¶¶ 12; JA 17, ¶¶ 22] It also asserted that the policy's prohibition against the receipt by Level 2 inmates of photographs of spouses, children, and other loved ones offends the First Amendment. [JA 17, ¶¶ 23] Banks asked on his own behalf and on behalf of all other Level 2 prisoners that the regulation be declared unconstitutional and enjoined. [JA 18]

The Department of Corrections viewed access to newspapers, magazines, and personal photographs as "privileges" when issuing the challenged policy soon after the Long Term

Segregation Unit was established in April of 2000.[1] [JA 75; JA 90; JA 48; JA 131; JA 189; JA 191] Guided by this perspective, the Department has systematically prevented Level 2 inmates from receiving what it characterizes as "common, secular newspapers or magazines" and from having photographs in their cells for as long as they remain in the Unit.[2] [JA 26, ¶ 3; JA 13-14, ¶ 10; JA 21; A15, ¶ 18; JA 22; JA 48]

There are no secular newspapers or magazines available on the Unit for Level 2 inmates nor do they have access to these materials from the main prison library. [JA 155; JA 26, ¶ 5; JA 52-64] Level 2 inmates are prohibited from receiving even individual clippings through the mail from secular newspapers or magazines unless an article has a direct nexus to them, such as a relative's obituary. [JA 154-155; JA172; JA 26, ¶ 5] The Department encourages inmates to cancel their subscriptions to secular periodicals upon their admission to the Unit. [JA 158] All newspapers or magazines received by an inmate prior to admission to the LTSU are stored, sent out of the institution, or destroyed. [JA 159] Prison personnel intercept and confiscate prohibited materials mailed to Level 2 prisoners. [JA 158-159] Banned items found in a Level 2 inmate's possession are treated as contraband, exposing the prisoner to discipline. [JA 156-157; JA 176]

Publications deemed to be religious in nature are exempted from the challenged regulation. [JA 12, ¶ 2; JA 21] The

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[1] These privileges are equated by the Department to shower shoes, access to the prison commissary, and the opportunity to work without pay as a Unit janitor. [See JA 48]

[2] These items are banned only in the Long Term Segregation Unit. As a matter of Department policy, every other housing category (including inmates on Death Row as well as disciplinary and administrative confinement) are permitted to receive varying amounts of secular periodicals and personal photographs. [JA 15, ¶ 15; JA 22; JA 15, ¶ 19; JA 22; JA 27 ¶ 8, JA 102; JA 173-174; JA 141-143; JA 149-152; JA 113; JA 159-160]

exemption is broader than a Bible, Koran or other books of scripture and encompasses newspapers and magazines. [JA 179-180] Under this standard, the *Jewish Daily Forward*, *The Watchtower*, *The Christian Science Monitor Magazine*, and other such "religious" periodicals may be received.[3] *Banks v. Beard*, 399 F.3d 134, 147 (3 Cir. 2005) *The Procedures Manual* governing the Long Term Segregation Unit defines "*approved*" religious materials as "*any written documents that are reasonably related to religion.*" [JA 77; JA 101] There is a protocol in place to resolve doubts as to whether a particular newspaper or magazine is religious. [JA 178-179; JA 50] The publication is sent to the prison Chaplain for review and it will be delivered to the inmate if he decides that it is religious. [JA 178-179] Likewise, periodicals deemed by prison officials to be "legal mail" are exempt from the ban. [See JA 49] By virtue of these exemptions, a Level 2 prisoner is permitted to have as many religious or law related periodicals in his cell that will fit in a standard records box. [JA 101; JA 35] There are no exceptions to the photograph ban; even a single photograph is prohibited. [See JA 26, ¶ 3; JA 15, ¶ 18; JA 22, ¶ 18; JA 48]

The ban on secular publications and personal photographs often persists for many months, even years; and applies to a substantial majority of the Unit's occupants at any given time. [JA 26, ¶ 3; JA 13, ¶ 7; JA 21, ¶ 7; JA 127-131] Inmates are confined on Level 2 for a minimum of three months. [JA 26; ¶ 3; JA 32] However, inmates can remain on that status much longer since an inmate's retention is open-ended, unlimited in duration, and determined by criteria that are vague and subjective.[4] [See JA 13, ¶ 7; JA 21, ¶ 7; JA 131-132; JA 26,

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[3] At the time Ronald Banks' *Christian Science Monitor* newspaper was seized, a *Christian Science Monitor Magazine* was delivered. [JA 179]

[4] Among the factors that determine how long an inmate will remain on Level 2 are the "amount of time" an inmate has been on the level, the "sanitation" of the inmate's cell, his "personal hygiene and grooming," his

¶ 3; JA 40] At the close of discovery, some prisoners had been on Level 2 since the Unit's inception—a period of more than two years. [JA 131-132] The Department *Procedures Manual* recognizes that inmates admitted to the Unit "demonstrated an inability or unwillingness" to conform to Department requirements. [JA 80] As such, there are some Unit prisoners who are unable to conform their behavior and, in the Department's words, will "never succeed in transcending the strictures of that status." [JA 26, ¶ 3; JA 31] On the day of the LTSU administrator's deposition, 36 of the 39 prisoners in the LTSU were on Level 2. [JA 130] The number of Level 1 inmates is "generally in the single digits . . ." [JA 130-131]

The challenged policy precludes Level 2 prisoners from reading any news accounts, analyses, editorials, investigative reports, feature stories, and other elements of general circulation journalism related to political, cultural, and other developments unfolding in the world beyond the Unit's walls, or from seeing the photographic images of their family and friends. [See JA 26; ¶¶ 3 and 4; JA 13, ¶ 10; JA 21, ¶ 10] This comprehensive suppression of knowledge occurs in an environment where Level 2 inmates have no meaningful opportunity to acquire information about political, scientific, or cultural events occurring in society at large and only rare opportunities to see the actual faces of loved ones. The Long Term Segregation Unit is essentially a prison within a prison; a cellblock in which inmates are "consigned to an existence of rigid isolation and enforced idleness for periods of many months and even years." [JA 13, ¶ 9; JA 21] There are no

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"interaction" with other inmates, his "demeanor" with the Unit staff, and his "involvement" in self-improvement activities. [JA 40; JA 89] As noted later, Level 2 prisoners have little opportunity to interact with other inmates and there is no indication in the *LTSU Rules and Regulations* or other Unit-related documents that they are offered any self improvement programs. [See JA 29-47; JA 65-101]

radios or televisions in the Unit. [JA 102] The only published materials Level 2 inmates are permitted to read, other than religious or legal publications, are paperback "leisure" books ordered from the prison library which consist largely of fantasy and romance novels, westerns, science fiction, and other forms of literature that do not focus on current events. [JA 39; JA 56] Social visits are limited to one hour a month with immediate family members, if an inmate has immediate family members who are willing and able to visit him. [JA 34; JA 98] No weekend or holiday visits are permitted. [JA 34; JA 98] Social telephone calls to persons outside the prison are barred. [JA 48] Level 2 prisoners are isolated in one-person cells twenty-three hours a day and "rarely able to speak or socialize directly" with each other. [JA 13, ¶ 9; JA 21, ¶ 9] Their ability to communicate with other Unit inmates is limited by a rule that prohibits "[l]oud talking or yelling from cell to cell." [JA 45, ¶ 6] Interaction with fellow prisoners is further constricted by a policy that permits only one inmate at a time to be outside a cell, under escort of two guards and in hand and leg irons. [JA 28, ¶ 12] Even when allowed to leave their cells for outdoor recreation, they do so "individually" in small "cages." [JA 13, ¶ 9; JA 21, ¶ 9; JA 37]

Level 2 inmates are permitted to receive mail. [JA 36] Under Department policy, the processing of incoming mail includes periodicals and photographs. [JA 115-117; JA 149] Mail is inspected for contraband in the prison mailroom prior to being delivered to the Unit. [JA 36] Incoming mail is delivered to the LTSU every day the mailroom is in operation and distributed to LTSU inmates by Unit officers. [JA 36] Officers collect outgoing mail-when they pick up the inmate's morning food trays. [JA 36]

Deputy Superintendent Joel Dickson, the Department's designated deposition witness and administrator of the Unit, testified that petitioner's ban on secular periodicals and personal photographs is premised on two penological objectives:

security and rehabilitation. [JA 188-189] According to Mr. Dickson, denying Level 2 prisoners access to general circulation publications and photographs is designed to make it more difficult for inmates to hide contraband in their cells; reduce the possibility that they will start cell fires; and decrease the potential for them to fashion paper weapons or implements with which to hurl waste and other projectiles from cells. [JA 189] Mr. Dickson did not contend that the ban on secular periodicals and photographs was enacted in response to any historical abuse of these materials by Level 2 prisoners. [See JA 118-200] He stated that precluding inmates from having secular periodicals and photographs might encourage them to modify their behavior and, thus, lead to their rehabilitation. [JA 189]

There is an abundance of *authorized* items in the cells of Level 2 inmates that can readily be used for the illicit purposes Deputy Dickson cited. In addition to a boxful of religious or law related newspapers and magazines, they are permitted to have two paperback library books; a writing tablet; ten envelopes; a cluster of personal letters; a pillow case; two bed sheets; a blanket; a laundry bag; a towel; a washcloth; a jumpsuit; several sets of undershirts, underpants, and socks; a roll of toilet paper; a drinking cup; a plastic food tray; and a spoon, in their cells. [JA 34-35; JA 38-39; JA 194-198] Even without secular periodicals and photographs, Mr. Dickson acknowledged that contraband can readily be hidden, fires can be started, paper weapons can be fashioned, and items can be thrown from the cells.[5] [JA 195-198]

LTSU policy requires that all cells "be subjected to a security inspection" at least three times a week and "thoroughly searched" at least once a week, and that inmates

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[5] There are only a few inmates who throw items from their cells. [JA 194] Those who do, use the authorized cups, pieces of paper, and other things in the cells for that purpose. [JA 194]

"change cells monthly." [JA 42] The policy also prohibits inmates from having any "flame producing materials" in their cells, including matches. [JA 39; JA 195] The LTSU cells are fronted by metal doors with a food slot (i.e., a "pie hole") through which meals and other items can be passed. [JA 199; JA 46, ¶ 10; JA 81] Under Department policy, the cell fronts are required to have "appropriate devices to prevent inmates from throwing items at staff (i.e. screening, door shields, etc.)." [JA 81]

While Deputy Dickson stated that LTSU inmates are not "totally predictable", he conceded that Unit personnel "fairly well know" which inmates "are prone to use their personal property in a violent sort of way . . ." [JA 197] As a matter of policy, an inmate's property is subject to confiscation if he uses or alters it in a way "that it is considered a threat to the safety and security of the institution. . . " [JA 34] Furthermore, an inmate's privileges may be suspended or taken away if his "behavior is deemed to warrant such loss." [JA 33] The Unit Team has "total authority regarding what privileges and for what period the privileges shall be forfeited" and any action in that regard is "administrative in nature." [JA 33-34]

When testifying about the behavior modification rationale, Deputy Dickson theorized that depriving inmates of secular newspapers, magazines, and personal photographs might encourage the prisoners to conform their behavior to Unit rules. [JA 189] Consistent with the Department's view that "being able to read a newspaper or a magazine . . . should be an earned privilege," he stated that Level 2 inmates must "earn" access to these items by "graduating" to Level 1. [JA 191] He asserted that the prohibitions are a way of inducing compliance with institutional rules—enabling an inmate either to become a "more productive citizen" (if released from incarceration) or to be integrated into the system's general population cellblocks (if not released). [JA 189] According to

Dickson, the Department is "very limited... in what [it] can and cannot deny or give an inmate" and secular periodicals and personal photographs "are some of the items that we feel are legitimate as incentives for human growth." [JA 190] Although the Department utilizes behavior modification counseling with Level 1 prisoners in the areas of "substance abuse; anger/violence management; life skills . . . and effective emotional expression," as ways of producing "human growth," these rehabilitative programs are not offered to Level 2 prisoners. [See JA 43] Instead, the Department relies exclusively on its deprivation theory to induce change.

The Long Term Segregation Unit was established primarily as a repository for prisoners expelled from the Special Management Units for failure to modify their behavior. [See JA136-137; JA 66-67, ¶¶ C and F] In a "minority of cases", inmates come from non-SMU housing areas. [JA 137] The Special Management Units are behavior modification cell blocks for "inmates who are, or have been, disruptive or violent." [JA 136, JA 68] They are "specifically designed to provide each inmate with the opportunity to demonstrate a stable level of behavior so they can be safely returned to general population or another suitable status." [JA 80] Most of the LTSU inmates are "people who have flunked out of or failed" in the Special Management Units. [JA 137] While in the SMUs, these prisoners were given a much broader spectrum of incentives to induce behavioral change than what is offered in the LTSU. Those inducements included: the opportunity to earn access to radios and televisions; up to ten magazines; bi-weekly social telephone calls; weekly visits with both friends and family members; weekly use of the prison commissary for purchases of up to twenty dollars; the ability to associate outside their cells with small groups of fellow prisoners; group recreational yard activities; educational classes and supervised study programs; the opportunity to leave their cells unshackled; and, if warranted, a probationary period in the general prison population. [JA 91-

102] Behavior modification failed for these men despite these incentives. [See JA 136-137]

Virtually all of the SMU incentives are eliminated or substantially diluted the instant an inmate enters the LTSU. [See JA 48] What remains (either in whole or in reduced form) is the ability to earn access to a secular newspaper; five magazines; one social telephone call per month; two social visits per month; use of the prison commissary for purchases of up to five dollars per week; and in-cell GED or special education study, if approved. [JA 102] During the first two-and-a-half years of the LTSU's operation, only ten inmates "graduated" from the Unit. [JA 138] Another two were released because their criminal sentences expired.[6] [JA 138]

SUMMARY OF THE ARGUMENT

1. Outside the prison walls, the free speech component of the First Amendment protects the right to "suitable access to social, political, aesthetic, moral, and other ideas and experiences." The acquisition of information includes the right to read what is printed in newspapers and magazines. Free speech, however, is not limited to printed words in periodicals; it also encompasses photographs.

2. A convicted inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with legitimate penological interests. Because the right to receive information in a prison setting is not inherently inconsistent with imprisonment itself or the objectives of imprisonment, it is not extinguished as an inmate passes through the prison gates.

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[6] Left to debate in another forum is the specter of incorrigibles being released to society who have been kept ignorant of political, social, and other developments during the period of their segregation.

3. A prison policy impinging upon an inmate's free speech rights is valid only if it is "reasonably related" to a legitimate penological interest.

4. The four-part standard established in *Turner v. Safley* to determine whether an administrative regulation is reasonably related to a legitimate penological interest is rooted in two fundamental principles: First, when considering a constitutional challenge to a prison policy, a court owes substantial deference to prison officials; and second, it must also "take cognizance" of valid claims asserted by inmates.

5. Neither judicial deference nor restraint will save the regulation if a court concludes that a policy either lacks a "rational connection" to legitimate a penological interest or is an "exaggerated response" to such an interest.

6. Level 2 inmates have shown that the challenged policy does not satisfy *Turner's* threshold requirement that a regulation impinging on a prisoner's constitutional right bear a rational connection to a legitimate penological interest. The ban on secular periodicals and personal photographs is arbitrary within the meaning of *Turner* because any connection the policy may have to the Department's asserted security and rehabilitative objectives is too attenuated to be rational. Among other things, the Department could not reasonably have thought when adopting the policy that it would advance security, since many of the items Level 2 inmates are allowed to have in their cells (including a boxful of religious or law-related periodicals) can be used for the illicit purposes cited by the Department as justifications for the policy. Likewise, in light of the incorrigible histories of the prisoners the Long Term Segregation Unit was designed to hold, the Department could not reasonably have thought the behavior of Level 2 inmates might be modified by the withholding of the First Amendment materials.

7. Because Level 2 inmates are isolated in an environment in which they have only the most minimal contact with the outside world, they do not have suitable alternate means of exercising their right to receive information about current political or other developments unfolding in society at large. The Department's contention that the inmates can receive such information through letters or visits is belied by the record and common sense. Petitioner's position also vastly understates the nature of the right at stake and the breadth of the knowledge that its policy suppresses.

8. Accommodation of the inmates' rights can be achieved without adverse impact on LTSU security or on the prison as a whole. The record confirms that permitting them to have some quantum of newspapers, magazines, and personal photographs in their cells is unlikely to have any negative "ripple" effect on inmates or guards in the Unit or on the institution. The Department already engages in routine screening and censorship of mail, and the addition of the banned items for fewer than forty men will not appreciably add to any administrative or other burden. Lifting the ban may, in fact, diminish the burden by eliminating the need to ascertain whether a publication is religious, law-related, or secular.

9. Finally, an alternative exists to a total ban on secular periodicals and photographs. These items can be delivered to the inmates' cells with their regular mail, kept for a specified "reading period", and returned when food trays are retrieved after meals.

ARGUMENT

1. The Challenged Policy Infringes Upon Core Inmate Free Speech Rights

The parameters of free speech outside the prison walls are well charted. In society at large, "[t]he use of the mails is almost as much a part of free speech as the right to use our

tongues. . ." *Blount v. Rizzi*, 400 U.S. 410, 416 (1971). Freedom of speech extends both to the speaker and a willing listener. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-757 (1976). As such, the protection of free speech on matters of public interest goes beyond the desire to foster self-expression and includes affording the public access to the dissemination of information and ideas. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (19878). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." *LaMont v. Postmaster General of United States*, 381 U.S. 301, 308 (1965) (Brennan concurring).

The First Amendment's free speech component is broad in scope. It protects the right to "suitable access to social, political, aesthetic, moral, and other ideas and experiences . . ." *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972). It encompasses the right to "acquire information about . . . common interests." *Grosjean v. American Press Co.*, 297 U.S. 233, 243 (1936). In conjunction with the acquisition of information, it includes a "right to read." *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965). The First Amendment also prohibits the government from "limiting the stock of information from which members of the public may draw," *Virginia State Board of Pharm. v. Virginia City Consumer Council*, 425 U.S. 748, 783 (1976) and from needlessly burdening the "public's right to hear and read" what others write and say. *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 470 (1995). Consistent with the spirit of the First Amendment, the State may not unduly "contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. at 481.

"[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP* v. *Claiborne Hardware*, 458 U.S. 886, 913 (1982).

The First Amendment "favors dissemination of information and opinion" and the guarantee of free speech was designed to prevent any action by the government which might unduly prevent "free and general discussion of public matters . . ." *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975). The Constitution contemplates that the press, which includes newspapers and magazines, will "play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966). Freedom of speech, however, is not limited to printed words appearing in periodicals: it encompasses photographs as well. See *Kaplan v. California*, 413 U.S. 115, 119-120 (1973).

Prisons are not immune from the sweep of the First Amendment. See *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A convicted inmate "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with legitimate penological objectives of the prison system." *Pell v. Procunier*, 417 U.S. 817, 822 (1972). One of the First Amendment rights that survive incarceration is freedom of speech. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Inmates are not stripped of free speech protection as they pass through the prison gates, although the exercise of this right is less extensive in a prison context. See *Jones v. North Carolina Prisoners Union*, 433 U.S. 119, 125 (1977). More to the point, lower federal courts, following *Pell's* "inconsistency principle", have long recognized that the right to receive information and ideas is not inherently inconsistent with imprisonment itself or the objectives of imprisonment.[7] See *Crofton v. Roe*, 170 F.3d

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[7] In their concurring opinion in *Procunier v. Martinez*, 416 U.S. 396 (1974), Justices Marshall and Brennan underscored the importance of an inmate's access to information in a prison setting. They wrote: "When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment...It is the role of the First

957, 959 (9 Cir. 1999); *Carpenter v. State of S.D.*, 536 F.2d 759, 761 (8 Cr. 1976); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1030, 1036 (2 Cir. 1985); *Sizemore v. Williford*, 829 F.2d 608, 610 (7 Cir. 1987); *Laaman v. Hancock*, 351 F.Supp 1265, 1267 (D.N.H. 1972); *Battle v. Anderson*, 376 F.Supp. 402, 426 (E.D.Okla. 1974); *Jackson v. Elrod*, 671 F.Supp. 1508, 1511 (N.D. Ill. 1987). Courts have concluded that the right to receive information in a prison setting encompasses newspapers and other such conduits.[8] See *Aikens v. Jenkins*, 534 F.2d 751, 755 (7 Cir. 1976); *Sizemore v. Williford*, 829 F.2d 608, 609-610 (7 Cir. 1987); *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9 Cir. 2001); *Abdul Wali v. Coughlin*, 754 F.2d at 1033-1034; *Allen v. Coughlin*, 64 F.3d 77, 80 (2 Cir. 1995); *Van Cleave v. U.S.*, 854 F.2d 82, 84 (5 Cir. 1988); *Cooper v. Schriro*, 189 F.3d 781, 784 (8 Cir. 1999). They have also recognized that photographs enjoy First Amendment protection in a prison context. See *Davis v. Norris*, 249 F.3d 800, 801 (8 Cir. 2001); *Peperling v. Crist*, 678 F.2d 787, 790 (9 Cir. 1982); *Trapnell v. Riggsby*, 622 F.2d 290, 292-93 (7 Cir. 1980); *Balance v. Virginia*, 130 F.Supp. 2d 754, 758-59 (W.D. Va. 2000).

It is settled that prison officials may constitutionally limit, for security reasons, the *volume* of free speech material that may be sent to an inmate or stored in a cell. See *Sheets v. Moore*, 97 F.3d 164, 168 (6 Cir. 1996); *Lindell v. Frank*, 377 F.3d 655, 659 (7 Cir. 2004). Prison officials may also impose appropriate restrictions on the *source*, *nature*, and *content* of such materials for security and other legitimate penological reasons without crossing the constitutional line. See *Bell v. Wolfish*, 441 U.S. at 549-551 (upholding a policy requiring

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Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearning of the human spirit." *Id.* at 428.

[8] The Department does not dispute that access to information and ideas is a right that continues in a prison setting. Nor does it dispute that photographs enjoy constitutional protection in a penitentiary context.

hardback books to be sent directly from the publisher or bookstores due to fact that hardback books are serviceable for smuggling contraband into an institution); *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (upholding on security grounds a regulation authorizing federal wardens to reject publications whose content would be detrimental to the security, good order, or discipline of the prison, or might facilitate criminal activity); *Waterman v. Farmer*, 183 F.3d 208, 209 (3 Cir. 1999) (allowing on rehabilitation grounds a ban on the receipt of sexually oriented materials by sex offenders); *Trapnell*, 622 F.2d at 293 (sustaining a ban on the receipt of sexually explicit photographs of an inmate's spouse). Whether the categorical ban in this case comports with the strictures of the First Amendment requires an examination of the record under the illumination of legal principles set out in *Turner v. Safley* and related Supreme Court decisions.

2. The Constitutionality of the Challenged Policy Must be Examined Within *Turner's* Analytical Framework Because the First Amendment Rights of Level 2 Inmates are Implicated

The analytical framework for determining the constitutionality of a prison policy impinging on an inmate's free speech rights is the four-prong reasonableness standard announced in *Turner v. Safley*, 482 U.S. 78 (1987). Under *Turner*, a regulation affecting the receipt of written publications and other First Amendment materials by prisoners is valid only if it is "reasonably related to legitimate penological interests." *Thornburgh v. Abbott*, 490 U.S. at 413. This multi-faceted test requires a court to ascertain whether there is a "valid, rational connection" between the challenged policy and the "legitimate and neutral" governmental interests said to justify it; whether the inmates have the ability to exercise the circumscribed right apart form the means prohibited by the policy; the costs that accommodating the right would have on other prison guards, fellow inmates and

prison resources; and whether there are alternatives to the policy that would fully accommodate the inmate's rights at little or no cost to valid penological interests. *Turner*, 482 U.S. at 89-91.

This is not a "toothless" standard that is inattentive to the rights of prisoners. See *Thornburgh*, 490 U.S. at 414-415. It is rooted in the principles that, when considering a constitutional challenge to a prison policy a court must not only defer to prison officials and exercise judicial restraint, but also "take cognizance" of valid claims asserted by inmates. See *Turner*, 482 U.S. at 84. Neither deference nor restraint will save a regulation if a court concludes that a policy lacks a "rational connection" to legitimate penological interests. See *Turner*, 482 U.S. at 89. The same is true if it finds that a policy represents an "exaggerated response" to such interests. See *Turner*, 482 U.S. at 97-99.

A. The Policy of Denying Secular Newspapers, Magazines, and Photographs to Level 2 Inmates is not Rationally Related to the Department's Stated Objectives [Factor One]

Under the first *Turner* factor, a prison policy "cannot be sustained where the logical connection between the regulation and the asserted [penological] goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. "If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other [*Turner*] factors tilt in its favor." *Shaw v. Murphy*, 532 U.S. 223, 229-230 (2001). When examining the nexus, a court must determine whether prison administrators "*might reasonably have thought* the policy would advance its interests." *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 1150 (2005) (citation omitted) (emphasis added). In that regard, a court may call upon "common sense" to aid the inquiry. *See Turner*, 482 U.S. at

98. There are instances where a logical connection between a policy and a stated penological objective is "self-evident." See *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003) (where a regulation prohibiting visitation by former inmates was found to bear a "self-evident connection" to interests in maintaining prison security and preventing future crimes). There are also occasions when it is obvious that there is no logical connection between a regulation and an asserted objective. See *Turner*, 482 U.S. at 98 (where "common sense" suggested that there was no logical connection between the challenged marriage restrictions and the formation of love triangles). If the existence or absence of a logical connection is not self evident, a court should examine the evidence to determine whether prison officials might reasonably have thought, when adopting the policy, that it would "advance" or "promote" the underlying objectives.[9] See *Overton*, 539 U.S. at 133; *O'Lone v. Shabazz*, 482 U.S. 342,351-52 (1987).

In *Overton*, this Court, when concluding that a prison visitation regulation restricting visitation by children bore a rational relationship to maintaining internal security and protecting child visitors, wrote: "The regulations *promote* internal security, perhaps the most legitimate of penological goals . . . by reducing the total number of visitors and limiting the disruption caused by children in particular. Protecting children from harm is also a legitimate goal. . . The logical

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[9] The *amicus* brief submitted by the Council of State Governments mistakenly suggests that the "rational connection" factor is merely a traditional rational basis review in which "[t]he burden is on the one attacking the [rule] to *negative every conceivable basis which might support it whether or not the basis has a foundation in the record.*" See Brief at p. 9 (citations and internal quotations omitted)(emphasis added.). In truth, *Turner* requires prison officials to "put forward" the legitimate governmental interests upon which the policy is predicated and it is those objectives that are the focus of Turner's first and three remaining factors. It is not the inmate's burden to negate "every conceivable basis" which might support a challenged policy.

connection between this interest and the regulations is *demonstrated by the trial testimony* that reducing the number of children allows guards to supervise them better and to ensure their safety. . ." *Overton*, 539 U.S. at 133 (emphasis added). In a similar vein, in *O'Lone* this Court examined the factual record before concluding that the goals cited by prison officials for a policy prohibiting inmates from returning to the institution during the day (and thus, precluding Muslim inmates from attending a daily religious service) "were *advanced*." 482 U.S. at 351 (emphasis added). Chief Justice Rehnquist wrote:

> "The subsequent policy prohibiting returns to the institution during the day also passes muster under [the logical connection] standard. Prison officials testified that the returns from outside work details generated congestion and delays at the main gate, a high risk area in any event. Return requests also placed pressure on guards supervising outside details, who previously were required to 'evaluate each reason possibly justifying a return to the facilities and either accept or reject that reason.' Rehabilitative concerns further supported the policy; corrections officials sought a simulation of working conditions and responsibilities in society. Chief Deputy Ucci testified: 'One of the things that society demands or expects is that when you have a job, you show up on time, you put in your eight hours, or whatever hours you are supposed to put in, and you don't get off...If we can show inmates that they're supposed to show up for work and work a full day, then when they get out at least we've done something.' These legitimate goals *were advanced* by the prohibition on returns; it cannot seriously be maintained that 'the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.'"

O'Lone, 482 U.S. at 351 (citations omitted) (emphasis added).

(i) *The Department's Policy is Not Rationally Related to Security*

The existence of a logical relationship between the challenged policy and the Department's security rationale is not self-evident. Moreover, the evidence shows that prison officials could not *reasonably* have thought that Unit security would be advanced to any appreciable degree by an absolute ban of secular periodicals and photographs.[10] It is obvious that the presence of the prohibited materials will not increase the security risk given the nature and amount of *authorized* items in the cells which can fuel cell fires, hide contraband, or be used for the other illicit activities identified by Mr. Dickson. It had to be obvious to Department officials when designing the policy, that without the banned materials, Level 2 inmates could readily conceal contraband in the boxful of religious or law related periodicals they are allowed to have, within the pages of a Bible or paperback books, in envelopes, between bed linen, and in numerous other places where authorized property is located. Department administrators

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[10] The Department's answer to the complaint reflects that security might not have been an objective of the policy at its inception but was developed as an *ad hoc* rationale in reaction to the litigation. The complaint alleged that neither the contents of the *Christian Science Monitor* nor the paper on which the newspaper was printed posed any meaningful risk to the security of the Long Term Segregation Unit or to prison as a whole. [JA 14, ¶ 12-13] The Department replied: "*After reasonable investigation and reflection, defendant can neither admit nor deny the allegations...without an extensive review of the origins, rationale and operation of the policy in question from the standpoint of prison security and general prison administration and the safe and effective operation of the LTSU program.*" [JA 21, ¶¶ 12-13] The policy originated only sixteen months prior to the filing of the lawsuit. See [JA 1] If denying Banks and his fellow Level 2 inmates access to general circulation newspapers was an effort to reduce the potential for hiding contraband, setting cell fires, fashioning paper weapons, and hurling projectiles from cells, as the Department later claimed, why was it unable to identify these security considerations soon after promulgating the policy?

could not have been oblivious to the fact that these inmates (if so inclined) can start or fuel fires with the array of approved flammable items and fashion paper weapons or fling projectiles with the approved items in their cells. Under these circumstances, one would have to suspend common sense to conclude that the elimination of a secular newspaper, a magazine, or a few photographs from Level 2 cells might have any appreciable positive impact on LTSU security. Deference should not trump common sense or the evidence. Any connection between the policy and security is so remote as to render the regulation arbitrary and irrational.

The Court of Appeals recognized the attenuated relationship between the policy and institutional security. When examining the connection, it wrote: "[I]f the prohibition of [secular] newspapers, magazines and photographs has only a minimal effect on security in the LTSU because of the other materials that they are permitted in the cells, the relationship between the policy and the [security] interest may be too attenuated to be reasonable." *Banks v. Beard*, 399 F.3d 134, 144 (3 Cir. 2005). The Court concluded that "given the materials Level 2 inmates are permitted in their cells, prohibiting a single newspaper or magazine has no significant relationship to the stated security objectives. There are many other non-prohibited means for inmates to fuel fires, hurl waste, conceal contraband and create weapons."[11] *Id.* at 143.

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[11] In parallel cases, lower federal courts have recognized the tenuous connection between absolute prohibitions of newspapers and other such periodicals, and prison security. As observed in one case, "given the fact that inmates in administrative segregation are permitted to have mattresses, blankets, pillow cases and sheets, clothing, letters and writing materials, legal papers, Bibles, and a limited number of non-subscription magazines and books . . . the court is compelled to conclude that inmates who wish to set fires can and will do so, whether or not they have subscription publications for fuel . . . and [that] deprivation of such publications would have, if at all, *de minimis* effect on the number of fires set

(ii) *The Policy is not Rationally Related to Rehabilitation*

The Department argues that because the challenged policy is part of a system-wide effort to modify the behavior of prisoners who engage in serious misconduct—the last step in a series of "progressively restrictive confinement and progressively restrictive privileges and opportunities"—the logical relationship is "unassailable." [*Petitioner's Brief*, p. 25] This formulation is inconsistent with the rational relationship inquiry articulated by this Court. What must be determined is whether it is self-evident that *the elements of this particular set of deprivations or rewards* advances the rehabilitation of Level 2 prisoners and, if not, whether prison officials, when designing the policy, might reasonably have thought that it would advance their rehabilitation. The rationality of the challenged policy must stand or fall on its own logical connection to *the rehabilitation of the Level 2 prisoners* and is not "unassailable" merely because it is part of the Department's broader behavior modification efforts. Moreover, the existence of a rational relationship between the policy in

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in administrative segregation" or on the intensity of fires. *Spellman v. Hopper*, 95 F.Supp. at 1273-74. See also *Mann v. Smith*, 796 F.2d 79, 82 (5 Cir. 1986) (where the court stated that "because the jail has a no smoking rule for inmates and the jailers permit the inmates to have other forms of paper and similar materials, the official rationale seems tenuous at best"); *Jackson v. Elrod*, 671 F.Supp. at 1511 (where the court concluded that the possibility of hiding contraband was not a sufficiently rational reason for circumscribing the receipt of publications by inmates where there were a number of other places in cells in which to conceal contraband items); *Prison Legal News v. Lehman*, 397 f.2d at 700 ("it is irrational to prohibit prisoners form receiving bulk mail and catalogs on the theory that it reduces fire hazards because the DOC already regulates the quantity of possessions that prisoners may have in their cells"; *Morrison v. Hall*, 261 F.3d 896, 902 (9 Cir. 2001) (where prison officials already regulate the amount of possessions inmates may have in their cells, it is . . . 'irrational' to prohibit prisoners from receiving subscription for-profit mail on the theory that it reduces fire hazards").

question and the asserted rehabilitative objective cannot be established merely by incanting the proposition that there is an obvious link (in general) between behavior modification and rehabilitation.

The policy in this case bears no self-evident link to the rehabilitation of Level 2 prisoners. It is not apparent on its face or a matter of common sense that depriving the most difficult inmates in the Pennsylvania prison system of secular periodicals and photographs might cause them to change their behavior. Furthermore, the record strongly suggests that there was no reason for the Department to believe that the regulation might have any positive impact on the rehabilitation of these historically incorrigible prisoners.[12] As outlined above, most of the inmates who are transferred to the LTSU come from Special Management Units where these so called "worst of the worst" failed to alter their behavior despite a cluster of incentives to do so. When creating the Unit, the Department knew that it would be populated by inmates who are incapable or unwilling to modify their behavior no matter what the incentives. If the prospects of having radios and televisions, weekly social visits, out of cell encounters with fellow prisoners, and the other inducements previously catalogued were insufficient to catalyze change, how could Department officials have *reasonably* entertained a view that withholding a newspaper or a few photographs might succeed? Under these circumstances, the policy lacks a rational relationship to rehabilitation and, therefore, is fatally flawed.[13]

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[12] In fact, three years after the policy's implementation, the Department stated during oral argument below that it was a "hope" that the policy might some day work. *Banks*, 399 F.3d at 142.

[13] In an effort to bolster its rehabilitation and security justifications, the Department asserts for the first time in this litigation that there is a deterrent aspect to the challenged policy. In its brief to this Court, the Department argues: "The restrictions on access to newspapers, magazines and photographs for Level 2 inmates are rationally related to the legiti-

B. There are no Meaningful Alternative Avenues for Level 2 Inmates to Acquire Information Related to Current Political, Cultural and Other Such Activities or to View Images of, and Events Involving, Loved Ones [Factor Two]

This factor recognizes that the evaluation of a challenged policy "cannot be considered in isolation but must be viewed in the light of alternative means" of exercising the right at issue. See *Pell*, 417 U.S. at 823. In a free speech context, when a court "is called upon to balance First Amendment rights against [legitimate] governmental interests," the existence of alternative methods of communication are "relevant in determining the scope of the burden placed by the regulation on inmates' First Amendment rights." *Turner*, 482 U.S. at 88. While the alternatives "need not be ideal" and only have to "be available," they must, nevertheless be of "sufficient utility" to give "some support to the regulations . . ." *Overton*, 539 U.S. at 135. It is when "reasonable and effective" means of exercising the right remain open that administrators "must be accorded [particular] latitude in

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mate goals of prisoner rehabilitation and prison security [by] presenting to other inmates the disincentive of losing such materials by engaging in serious misconduct . . ." [*Petitioner's Brief*, p. 24] There is no reference in the record to this "deterrence" justification. Even the Department's *Statement of Material Facts Not in Dispute* made no mention of any goal of deterring inmates housed outside the LTSU from engaging in misconduct. [See JA 27, ¶¶ 8-10] Proffering this rationale five years after commencement of this lawsuit raises additional questions with respect to the policy's actual purpose. In *Turner*, when addressing an argument forwarded by the Missouri Division of Corrections that permitting inmate marriages might result in "love triangles" and violent confrontations between inmates, this court underscored the fact that the petitioners had "pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing such entanglements" when concluding that the marriage policy was not reasonably related to security. *Turner*, 482 U.S. at 98.

drawing [the] lines" which impact the right. See *Pell*, 417 U.S. at 826. Where there are "particular qualities inherent" in the prohibited form of speech which are not present in the available avenues, "[the] existence of other alternatives [does not] extinguis[h] altogether any constitutional interest on the part of the [prisoner] in this particular form" of speech. *Pell*, 417 U.S. at 823-824, quoting *Kleindienst*, 408 U.S. at 765.

When applying *Turner*, "the right in question must be viewed reasonably and expansively." *Thornburgh*, 490 U.S. at 417. The right impinged by the periodical ban is the access of Level 2 prisoners to information and ideas from the outside world. Foreclosing them from subscribing to secular newspapers and magazines effectively eliminates all meaningful avenues through which they can acquire current information related to the spectrum of political, cultural, scientific, and other societal activities occurring in the United States and abroad. These men are among the most isolated citizens in the nation. Cutting them off from the means by which Americans routinely acquire their information (newspapers, magazines, radios, and televisions) causes an extraordinary constriction—approaching absolute—of the stock of information from which these men may draw. See *e.g. Virginia State Board of Pharm.*, 425 U.S. at 783. It is disingenuous for the Department to suggest that this *Turner* prong can be satisfied through letters, sporadic social visits, access to the prison chaplain, and the opportunity to meet with attorneys.

The time when letters served as a primary means of communicating political and other public developments expired long ago. Furthermore, it is specious for the Department to argue that the few individuals with whom Level 2 prisoners may interact can fill this void. According to the *DOC Procedure Manual*, the chaplains "are responsible for tending to each inmates' religious needs . . ." [JA 100] Their purpose is not to summarize news or other evolving develop-

ments for inmates. Likewise, if an inmate has counsel, the attorney's purpose is to discuss his legal affairs. Social visits for inmates who have family members willing and able to visit are limited to an hour a month. Against this backdrop, it is absurd to contend that letters, chaplains, attorneys or family visits can function as suitable surrogates for periodicals. None of these avenues can approximate the diversity and depth of coverage provided by newspapers and magazines. Any information conveyed through these means cannot reasonably be expected to be anything more than sporadic and superficial.

Furthermore, the fact that Level 2 prisoners are permitted to receive religious and law related publications and paperback "leisure" books does not fill the informational void. The availability of these materials merely creates the anomalous situation where an inmate can read about biblical wars and political intrigue occurring thousands of years ago, but not about the war in Iraq or lobbying practices affecting the operation of Congress; where he can learn about the plagues of ancient Egypt but not about the ravages of Hurricane Katrina; where he can plumb the depths of science fiction but not follow current scientific developments.

The scope and intent of general circulation periodicals are profoundly different than any of the available avenues through which Level 2 inmates can acquire information and ideas. The alternative avenues, to borrow from *Overton*, are not of "sufficient utility" to "give some support to the regulations. . ." See *Overton*, 539 U.S. at 135. Nor are they, in the words of *Pell*, "reasonable and effective means" of exercising the right. See *Pell*, 417 U.S. at 826. The practical implication of the Department's ban is to literally wall these inmates off from the contemporary world.

Under the Department's policy, Level 2 inmates also have no suitable alternatives to photographs. Letters and occasional visits with immediate family members cannot sub-

stitute for photographs when a parent, spouse, or child is deceased; when a relative is too ill or disabled to travel to prison; if a person is merely a friend and thus ineligible to visit; or if a picture concerns past events like an inmate's combat service, the birth of a child, a high school graduation, or a wedding. There are unique qualities inherent in photographs that are not approximated by the available avenues of contact that remain open to these prisoners.

C. Allowing Level 2 Prisoners to Receive the Banned Publications Will Have No Appreciable Negative Impact on the Long Term Segregation Unit or on the Prison Where the Unit is Located [Factor Three]

Turner's third factor assesses the "impact" that accommodating an inmate's constitutional rights will have on guards and fellow prisoners and on "the allocation of prison resources generally." *Turner*, 482 U.S. at 90. This element addresses whether an accommodation will have "adverse effects on the institution." See *O'Lone*, 482 U.S. at 352. Identifying the *nature* and *extent* of any adverse impact is important because courts must be "particularly deferential to the informed discretion of prison officials" only if the impact "will have a significant 'ripple effect' on fellow inmates or on prison staff. . ." See *Turner*, 482 U.S. at 90. Such an effect occurs when "the right can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike," *Thornburgh*, 490 U.S. at 418, or where an accommodation "would cause a significant reallocation of the prison system's financial resources . . ." *Overton*, 539 U.S. at 126.

As discussed under Factor One, the record shows that accommodating the inmates' access to secular periodicals and photographs will have no significant negative impact on the Department's asserted penological interests. Because these inmates are in strict isolation, and already have access to

religious and legal periodicals as well as the other items catalogued above, allowing a small quantum of secular newspapers, magazines, and family photographs in individual cells is unlikely to have the "ripple effect" claimed by the Petitioner of increasing security risks to guards and prison staff.[14] Moreover, for the reasons discussed under Factor One, Level 2 inmates' access to these First Amendment materials will not adversely affect their rehabilitation.

Finally, there will be no significant impact on the allocation of prison resources. Department policy contemplates that newspapers, magazines, and photographs, like other inmate mail, will be received at the prison mailroom for screening. The addition of periodicals or photographs for the fewer than forty Level 2 inmates will not significantly burden that process. Instead, lifting the ban may, in fact, diminish the burden by eliminating the need to ascertain whether a publication is religious, law related, or secular. Department policy also contemplates that mail will be forwarded to the Unit and delivered to inmates by LTSU officers. [JA 36] The addition of a small number of periodicals or photographs would not significantly burden this process. Under existing protocol, LTSU outgoing mail is given to Unit officers when they pick up the morning food trays. Within this format, a newspaper, magazine, or photograph could easily be delivered to a Level 2 prisoner with his authorized mail and the periodicals retrieved when his food tray is picked up after one of the later daily meals. The addition of periodicals and photographs to that process will have little impact. Furthermore, there are already policies in place which control the volume of periodicals and photographs inmates in various housing categories are permitted to receive

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[14] For the first time, the Department makes a deterrence argument in connection with this factor; one that it did not advance in the courts below. It contends that "[e]xcluding those privileges from the management arsenal of prison administrators would diminish the severity of Level 2, with the "ripple effect" of diminishing its value . . . as a deterrent to serious misconduct by other inmates. . ." [*Petitioner's Brief* at p. 31]

as well as censorship policies regulating the content of those items.[15] The volume policies can readily be amended to incorporate a specific provision for Level 2 inmates and the censorship standards can be applied to their receipt of secular publications and photographs, thus enabling the Department to protect its security and rehabilitative interests.

D. There Are Easy Alternatives to a Total Ban of Secular Periodicals and Personal Photographs [Factor Four]

Turner's last factor focuses on the availability of "ready alternatives" to a challenged policy. *Turner*, 482 U.S. at 90. "When prison officials are able to demonstrate that they have rejected a less restrictive alternative because of *reasonably founded fears* that it will lead to greater harm [or significant administrative inconvenience], they succeed in demonstrating that the alternative they in fact selected was not an 'exaggerated response' under *Turner*." *Thornburgh*, 490 U.S. at 419 (emphasis added). On the other hand, if an inmate can show an alternative that fully accommodates his rights at "*de minimus* cost" to valid penological interests, this is evidence that a policy is not reasonable, but is an 'exaggerated response' to prison concerns. *See Turner*, 482 U.S. at 97-98. When there is "substantial evidence in the record to indicate that officials have exaggerated their response to [penological] considerations," the need to defer to their judgment dissipates. See *Jones*, 433 U.S. at 128. Under this factor, a court is to "consider whether the presence of ready alternatives undermines the reasonableness of the regulations." *Overton*, 539 U.S. at 136. While this factor is not a "least restrictive alternative" test where prison administrators are required to

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[15] *See PA. DEPT. OF CORRECTIONS*, Policy Statement DC-ADM 803, "Inmate Mail and Incoming Publications", *available at http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_803_Inmate_Mail_and_Incoming_Publications1.pdf* (visited February 10, 2006).

"set up and then shoot down every conceivable alternative method of accommodating" an inmate's constitutional right, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 90-91. "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Turner*, 482 U.S. at 91.

In the proceedings below, the Level 2 prisoners pointed to an easy alternative suggesting that LTSU officers deliver a periodical to an inmate's cell for a limited period of time and retrieve the newspaper or magazine when the time expires. The Court of Appeals found that alternative acceptable under *Turner's* third and fourth factors, reasoning:

> Banks proposes [that] . . . the DOC could establish a specific reading period, or several different reading periods, in which guards deliver a single newspaper or magazine to an inmate's cell, if requested, and retrieve it at the close of the period. The DOC could easily control the number of periodicals in his cell at one time, the frequency of the distributions, the amount of time any inmate would be in possession of the materials, as well as the number of inmates who would have the periodicals in their cells at any one time. The DOC could also limit the total number of photographs a Level 2 inmate could have in his cell at one time to what they consider a reasonable number. In conjunction with this policy, access to periodicals could be entirely withheld from those individual prisoners who, in the judgment of prison officials, *would* pose a particular risk given their records, or those inmates who *have* abused their use of periodicals or photographs. . .

Banks, 399 F.3d at 146-147.

This approach is consistent with *Turner* where a Missouri marriage regulation was found to be an exaggerated response to security objectives. *Turner* concluded that there was an easy alternative to the broad prohibition against inmate marriages at issue in that case, namely, that the right to marry could be accommodated by generally permitting marriages to take place "but not if [the] warden finds that it presents a threat to security or order of [the] institution, or to public safety." *Turner*, 482 U.S. at 97-98. As noted previously, the Department's policy already contemplates a suspension or loss of an LTSU inmate's privileges if his behavior is deemed to warrant either. [JA 33] An existing LTSU rule provides for the confiscation of any item in an inmate's cell that is altered or misused. [See JA 34] Applying these regulations to newspapers, magazines and photographs on Level 2 will not, for the reasons expressed above, be burdensome.

CONCLUSION

For the reasons expressed above, the Department of Correction's policy of denying Level 2 inmates access to secular newspapers, magazines, and photographs is not reasonably related to the security and rehabilitation objectives cited by the Department either because it bears no *rational relationship* or is an *exaggerated response* to those objectives. As such, it violates the inmates' First Amendment right to freedom of speech and the Circuit Court's decision should be affirmed.

Respectfully submitted,

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